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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5159

ALEXANDER ALDOUPOLIS,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

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CASES

The Petitioner, Alexander Aldoupolis, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts rendered in this proceeding on May 13, 1982.

QUESTION PRESENTED FOR REVIEW

Is it a violation of Petitioner's Fifth and Fourteenth Amendment Right not to be placed in double jeopardy to be resentenced or retried when Petitioner has already pleaded guilty and commenced serving a legally imposed sentence with every expectation that it was a final disposition?

OPINIONS BELOW

The decision of the Supreme Judicial Court of Massachusetts is reported at 386 Mass. 260 (1982). (See Appendix A).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Supreme Judicial Court sought to be reviewed was issued on May 13, 1982. On May 25, 1982 Petitioner requested a rehearing. The Court denied the Petition for a Rehearing on June 3, 1982. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Rule 29 of the Massachusetts Rules of Criminal Procedure provides in part:

> (a) Revision or Revocation. The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order revise or revoke such sentence if it appears that justice may not have been done.

STATEMENT OF THE CASE

On October 5, 1981, in Norfolk Superior Court, Alexander Aldoupolis, (hereinafter, "Petitioner"), along with co-defendants Richard Dovel, Mark Savoy, John Strickland, and Robert J. Tarr pleaded guilty to charges of rape, unnatural rape and malicious destruction of property. Abrams, J. accepted their guilty pleas and sentenced them to suspended sentences of from three to five years at the Massachusetts Correctional Institution Walpole; two years probation; and imposed court costs of $500, to be paid at the rate of $5 per week. Petitioner Aldoupolis began serving his sentence by signing a probation contract, commencing his probation and beginning payment of the imposed court costs prior to October 9, 1981. He has continued to pay the court costs

up to the present time.

On October 8, 1981, counsel for each defendant was notified to appear in court the following day, but were given no reason for such required presence. On October 9, 1981, Abrams, J. claiming to be acting pursuant to Mass. R. Crim. P. 29, (see Appendix B) revoked the suspension of the sentences and ordered each defendant to stand committed at MCI, Walpole, if they did not elect to withdraw their guilty pleas by October 13, 1981. In revoking the suspension of the sentences the judge 1) noted the "public interest in the sentences" previously imposed, 2) questioned the legality of the suspended sentences and, 3) referred to statements of the District Attorney apparently made to the media after the public clamor* objecting to the suspended sentences. The judge left the bench without allowing counsel for the defendants an opportunity to be heard. Petitioner obtained a stay of the Superior Court proceeding on October 9, 1981 from a single justice of the Supreme Judicial Court.

On May 13, 1982, the Supreme Judicial Court, in Aldoupolis v. Commonwealth, 386 Mass. 260 (1982), held, 1) that the original suspended sentences were legally imposed; 2) that a trial judge does have the power to revise and revoke sentences on his own power so as to increase their severity, and that such resentencing does not violate the constitutional prohibition against double jeopardy; and, 3) that the defendants did not receive proper notice and an opportunity to be heard on the issue of a revision and revocation of their sentences, thus rendering the trial judge's resentencing invalid.

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* It should be noted that the suspended sentences imposed on October 5, 1981 received much media attention and criticism. The Governor of Massachusetts injected himself into the controversy and criticized the judge whom he had appointed. See Appendix L for sample of media coverage.

The Court ruled that the judge had the power to vacate the original sentences and impose new ones and directed the Superior Court to resentence the defendants even though it had declared the original suspended sentences valid. On May 25, 1982, the defendants petitioned the Supreme Judicial Court for a rehearing, (see Appendix C) requesting reconsideration of their double jeopardy claim. The Court denied the Petition for Rehearing on June 3, 1982. (See Appendix D). On June 25, 1982 a Superior Court judge acting pursuant to the order of the Supreme Judicial Court to resentence, ordered the Petitioner to appear for resentencing at 10 A.M. on July 1, 1982.

On Monday, June 28, 1982, Petitioner filed a complaint under 42 U.S.C. §1983 in United States District Court requesting that the resentencing on July 1 be enjoined. On Tuesday, June 29, 1982, Petitioner requested that the Supreme Judicial Court of Massachusetts stay the resentencing so as to allow the filing of a Petition to this Court for a writ of certiorari. (See Appendix E). Later in the day on June 29 such request was denied. (See Appendix F).

On June 30, 1982, Federal District Court Judge Robert Keeton denied Petitioner's request for injunctive relief under 42 U.S.C. §1983. (See Appendix G). Later that same day the United States Court of Appeals for the First Circuit affirmed the denial of injunctive relief. (See Appendix H).

Late in the afternoon on June 30, 1982, Petitioner requested a stay of the resentencing from the Honorable William J. Brennan, Jr., Associate Justice of this Court and Circuit Justice for the First Circuit. On the morning of July 1, 1982, resentencing proceedings began in the Superior Court of Massachusetts for Norfolk County, before Donahue, J. Judge Donahue stated that he interpreted the order of the Supreme Judicial Court to allow him to resentence Petitioner Aldoupolis up to the maximum punishment permitted by law, in this case life imprisonment. (See Transcript of Proceedings, 15, Appendix I) Counsel for Petitioner objected to resentencing as a violation of

Petitioner's right not to be placed in double jeopardy. (Transcript, 14, Appendix I). Petitioner then filed a Motion to Withdraw Guilty Plea. Petitioner made it absolutely clear that the only reason he filed the Motion to Withdraw Guilty Plea was in order to preserve his double jeopardy rights. (Transcript, 14, Appendix I). The Motion was denied by Judge Donahue. Before the resentencing proceedings of July 1, 1982 could be completed, Justice William J. Brennan, Jr., entered an order staying the resentencing proceeding pending the receipt of a response from the attorney general and a further order. (See Appendix J). On July 6, 1982, Justice Brennan vacated the order of July 1, 1982 and Petitioner's Application was denied without prejudice to reapplication after final disposition of the proceedings before the Superior Court of Massachusetts for Norfolk County. (See Appendix K).

On July 15, 1982, resentencing proceedings resumed in the Superior Court of Massachusetts for Norfolk County. Judge Donahue reconsidered and granted Petitioner's Motion to Withdraw Guilty Plea of July 1, 1982, without Petitioner having filed a new Motion. Again, counsel for Petitioner made it clear that the Motion had been submitted only as the last possible means of protecting Petitioner's constitutional right not to be placed in double jeopardy. (See Affidavit of counsel). Judge Donahue ordered Petitioner to stand trial on December 2, 1982.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. THE DECISION BELOW RAISES SERIOUS AND RECURRING QUESTIONS AS TO THE INTERPRETATION OF THIS COURT'S HOLDING IN UNITED STATES V. DIFRANCESCO.

A. Since Petitioner in the case at bar commenced service of a legally imposed sentence with every expectation that it was a final disposition, this Court's holding in United States v. DiFrancesco is not controlling.

In ordering Petitioner Aldoppolis to be resentenced, the Supreme Judicial Court relied on this Court's holding in United States v. DiFrancesco, 449 U.S. 117 (1980) as dispositive

of Petitioner's double jeopardy claim. See Aldoupolis v. Commonwealth, 386 Mass. 260, 274 (1982). However, the case at bar can be easily distinguished from DiFrancesco. In DiFrancesco, the Supreme Court considered a Congressional Statute* which specifically authorized the government to appeal the sentence of a "dangerous special offender" and which put the defendant on notice that his sentence was not final until the appeal was completed. The Supreme Court held that this right of appeal under "The Organized Crime Control Act of 1970," 18 U.S.C. §3576, did not violate the double jeopardy clause:

> Under §3576 the [prosecution's] appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.

DiFrancesco, supra, at 136 (emphasis added).

The holding of the Supreme Judicial Court that the "defendants should not have had an expectation of finality in their sentences" in the face of Rule 29 of the Massachusetts Rules of Criminal Procedure (Aldoupolis, supra, 274) is not supported by the history and use of Rule 29. Rule 29 authorizes the "judge upon his own motion or the written motion of a defendant filed within sixty days...[to] revise or revoke such sentence if it appears that justice may not have been done." Historically, Rule 29 and its predecessors have always been understood to govern the reduction, not the increase of a sentence. The Reporters' Notes to the Rules state "The rule governs reductions of sentences motivated by demands of fairness." Mass. Ann. Laws, Criminal Procedure 474 (Lawyers Co-op 1979) (emphasis added) cf. District Attorney for the Northern District v. Superior Court, 342 Mass.

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* 18 U.S.C. §3576: "With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, [dangerous special offender], a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a Court of Appeals" DiFrancesco, supra, at 120 N.2.

119, 127-128 (1961). The Reporters' Notes state also (at 475) the rule "[t]hat an increase in the sentence once execution has commenced is not permitted."* In fact, at the time of the sentencing Rule 29 had never been used to authorize the increase of a sentence once the defendant had begun serving it.

Rule 29, therefore, failed to give Petitoner notice that his sentence could be increased and is not analogous to §3576. Furthermore, the review proceeding in DiFrancesco is a direct appeal as of right, based on the record of the trial court. Id. at 120 N.2. However, the "revise and revoke" proceeding under Rule 29 is collateral in nature. It represents an extraordinary process, taken at the discretion of the trial judge.

Where a criminal defendant has an expectation of finality the double jeopardy clause prohibits the very act of twice bring put in jeopardy.

> 'The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished but against twice being put in jeopardy...' ...The 'twice put in jeopardy' language this relates to a potential...

Abney v. United States, 431 U.S. 651, 661 (1977) quoting from Price v. Georgia, 398 U.S. 323, 326 (1970). This Court has held that the right not to be placed in double jeopardy involves the danger of irreparable harm and must be protected prospectively. Abney, supra 658. Therefore, double jeopardy claims are immediately reviewable, prior to the completion of criminal proceedings. Abney is not limited to federal cases but applies equally to state

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* This Court in DiFrancesco, supra, 139 did not overrule the long-established principle against increased sentences but rather refused to apply it where the defendant had no legitimate expectation of finality. Other exceptions allow an increased sentence where the original sentence imposed was invalid, Bozza v. United States, 330 U.S. 160, 166 (1947) or where the defendant obtains a new trial, North Carolina v. Pearce, 395 U.S. 711, 719-721 (1969). None of these exceptions are applicable to the case at bar.

court proceedings. See Bullington v. Missouri, 451 U.S. 430, 437 N.8 (1981). In Bullington this Court applied the protection of the double jeopardy clause to the sentencing process, while further state proceedings were still pending. The underlying value of the double jeopardy clause therefore prohibits the very act of a second trial, regardless of the possible verdict and also prohibits resentencing.

> The general function of the double jeopardy clause is to assure that the prosecution and punishment of an individual have the degrees of finality and fairness essential to administration of the criminal law...; the degree of finality insures that a criminal defendant, having once been convicted and punished or acquitted, not live in a state of anxiety and insecurity for fear of further prosecution or punishment of the same offense.

A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple Punishment Doctrine, 90 Yale L.J. 632, 634 (1981).

The prohibition against being placed in double jeopardy therefore "represents a policy of finality for the defendants' benefit" in criminal proceedings. United States v. Jorn, 400 U.S. 470, 479 (1971); see also, Crist v. Bretz, 437 U.S. 28, 33 (1978). This expectation of finality attaches as soon as a defendant is placed on probation:

> The general rule is that an increase in sentence after the defendant has commenced serving his punishment, is a violation of defendant's right not to be subject to double jeopardy. While in the present case it may appear that the serving of a few days probation has such a minimal effect on a defendant that there is no injustice done by altering the sentence, we can easily conceive of circumstances in which a court might attempt to increase the defendant's punishment after months or years of probation have been served. A formal rule against any increase in penalty after service of probation has commenced will prevent any such occurrences and insure the defendant the requisite degree of finality in the disposition of his case.

United States v. Bynoe, 562 F.2d 126, 128-129 (1st Cir. 1977). See also Breest v. Helgemoe, 579 F.2d 95,99 (1st Cir. 1978). In the case at bar Petitioner commenced service of a valid, legally imposed sentence. He has since served several months of probation and made weekly payments of court costs as part of his sentence. When Petitioner began serving his sentence, he had no reason to question its finality. Therefore, the holding of DiFrancesco is not applicable to the case at bar and the reliance of the Supreme Judicial Court on DiFrancesco is misplaced.

It is also significant that DiFrancesco was a 5-4 decision, with the four dissenters present members of the Court. Two members of the majority in that case, Justice Rehnquist and Chief Justice Burger, stated in Whalen v. United States, 444 U.S. 684, 703 (1980) (Rehnquist, J. dissenting) handed down just before DiFrancesco, that "Ex parte Lange prevents a sentencing court from increasing a defendant's sentence... even though the second sentence is within the limits set by the legislature." Thus it is not at all clear that a majority of the Court would allow an increase in sentence without the notice of lack of finality present in Difrancesco. It should also be noted that Justice Blackmun, who wrote the majority opinion in DiFrancesco, later wrote the majority opinion in Bullington v. Missouri, 451 U.S. 430 (1981) which affirmed that the double jeopardy clause applies to the sentencing process.

B. The Circuit Courts of Appeal have reached inconsistent results in their interpretation of this Court's holding in DiFrancesco.

Recently the Fifth Circuit recognized that DiFrancesco is not applicable where the defendant is not put on notice of the lack of finality. In Bullard v. Estelle, 665 F.2d 1347, 1361 (5th Cir. 1982) the court stated that,

> [The] cautious approach [in DiFrancesco] in limiting its holding and distinguishing the factual context in which it was appropriate suggested that other sentencing proceedings might implicate the values of the double jeopardy clause.

> Bullington provides the gap left by DiFrancesco required for our analysis of this case and mandates application of the double jeopardy clause to the case before us.

The Couft held that DiFrancesco was not controlling and that the petitioner Bullard had a legitimate expectation of finality. See Bullard, supra at 1361, N.30. The Fifth Circuit, therefore, limited DiFrancesco to its factual context and refused to extend it.

The First Circuit has reached a contrary result and has held DiFrancesco to be controlling even where a criminal defendant has every expectation of finality. In Aldoupolis v. Superior Court Dept. of the Trial Court of Massachusetts, No. 82-1533, (1st Cir. June 30, 1982) (see Appendix H), the Court of Appeals adopted the reasons of the district court in rejecting Petitioner Aldoupolis' double jeopardy claim in a 42 U.S.C. §1983 action. The district court recognized that "one might reasonably argue that no state law comparable to the dangerous special offender statute is involved here and that this case is outside the reach of DiFrancesco." Aldoupolis v. Superior Court Dept. of the Trial Court of Massachusetts, 82-1795-K, Memorandum at 3 (D. Mass. June 30, 1982) (see Appendix G). Nevertheless, in ruling against the Petitioner, the court held that the "rationale" of DiFrancesco was dispositive of Aldoupolis' double jeopardy claim. Id. at 3.

The Third Circuit has also interpreted DiFrancesco broadly. In United States v. Busic, 639 F.2d 940 (3rd Cir. 1981) the court applied DiFrancesco in holding that double jeopardy does not bar resentencing following appeal even on counts that were not set aside on appeal. The Second Circuit, however, has expressed uncertainly as to the reach of DiFrancesco. In McClain v. United States, 643 F.2d 911, 913 (2nd Cir. 1981) the court stated that it was unclear what effect DiFrancesco had on

the general rule prohibiting an increased sentence once a defendant has commenced serving a valid sentence.

It should also be noted that there is conflict among the highest state courts in their interpretation of DiFrancesco. In State v. Ryan, 86 N.J.1, 429 A.2d 332, cert. denied, 102 S. Ct. 363 (1981) the New Jersey Supreme Court reached a result directly contrary to that of the Supreme Judicial Court of Massachusetts. In Ryan the Court held, in a strongly worded opinion, that DiFrancesco is not applicable where a criminal defendant has a legitimate expectation of finality. Once a defendant has commenced serving a sentence, expecting it to be final, that sentence may not be increased. Therefore, in Ryan the Court vacated the increased sentence and re-instated the original sentence imposed.

III. PETITIONER HAS NOT WAIVED HIS CONSTITUTIONAL RIGHT NOT TO BE PLACED IN DOUBLE JEOPARDY.

Petitioner's Motion to Withdraw Guilty Plea, filed in the resentencing proceedings of July 1, 1982, was not a waiver of his double jeopardy claim. Petitioner made it absolutely clear that said Motion was submitted only to protect his double jeopardy claim:

> MR. HRONES. So let me put on the record, so it's absolutely clear, that the Defendant Aldoupolis, number one, objects to this resentencing. It is his position that it violates his rights, under the United States Constitution, not to be put in double jeopardy, because the Supreme Judicial Court of this State declared the original sentence he gave on Monday, October Fifth, was a legal one. I want it absolutely clear, any motions filed today are not waiving that point. That the only reason these motions are being filed is because the defendant must file them in order to protect his double jeopardy rights.

Transcript of Proceedings, 14-15, Appendix I.

Petitioner emphasized that the very act of resentencing to any punishment other than the sentence originally imposed would be a violation of his right not to be placed in double jeopardy.

Since the sentencing judge had already stated that he was not bound to impose the original sentence, but could sentence the Petitioner up to the maximum punishment of life imprisonment (Transcript 15, Appendix I) and the stay of resentencing by Justice Brennan had not yet been entered, the Motion to Withdraw Guilty Plea was the only way to protect Petitioner's double jeopardy right and prevent immediate incarceration. Thus, it cannot be said that Petitioner voluntarily waived his double jeopardy claim by withdrawing his guilty plea. On the contrary, he moved to withdraw the plea precisely in order to preserve his constitutional right.

In Green v. United States, 355 U.S. 184, 191-192 (1957) this Court held that a waiver involves the knowing relinquishment of a right and can only take place where the defendant has a meaningful choice. Petitioner in the case at bar had no meaningful choice. He had to either withdraw his plea or be unconstitutionally resentenced. He certainly did not relinguish the very right he intended to protect.*

While Petitioner contends that any act of resentencing violates his double jeopardy rights, the disposition by Judge Donahue in Superior Court that Petitioner stand trial subjects him to the risk of even greater harm. The double jeopardy clause clearly "protects against a second prosecution for the same offense after conviction." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Petitioner has already been convicted by virtue of his guilty plea, has commenced serving his sentence and has continued to pay the imposed court costs up to the present time. To compel Petitioner to face the "hazards of trial and possible

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* The "voluntary choice doctrine," which allows retrial where a defendant successfully appeals his conviction, North Carolina v. Pearce, 395 U.S. 711, 719-721 (1969), or succeeds in having his trial terminated prior to a determination of guilt or innocence, United States v. Scott, 437 U.S. 82, 87-92 (1978) is not applicable to the case at bar.

conviction more than once for an alleged offense" is to force him to "run the gauntlet" a second time. Green, supra, 187, 190. Petitioner has certainly "run the gauntlet" a first time. He underwent a guilty plea proceeding and has appeared in court for sentencing on no less than four occasions. He has had to undergo the stigma of massive publicity. His picture has appeared on every television station and in every major newspaper in the Greater Boston area, as well as in national publications. (See Appendix L for sample of media coverage). To compel Petitioner "to live in a continuing state of anxiety and insecurity" by ordering him to submit to trial and face the risk of imprisonment is to place him in jeopardy for the second time. See Green, supra, 187-188.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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